

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs June 3, 2008, at Jackson

**ANTHONY DWIGHT WASHINGTON v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Davidson County**  
**Nos. 2003-C-2058 and 2003-B-1297 Cheryl Blackburn, Judge**

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**No. M2007-01366-CCA-R3-PC - Filed November 6, 2008**

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The petitioner, Anthony Dwight Washington, appeals as of right the Davidson County Criminal Court's denial of his petition for post-conviction relief challenging his guilty pleas to statutory rape and sale of .5 grams or more of cocaine based upon allegations of ineffective assistance of counsel and an involuntary guilty plea. The petitioner also appeals the denial of alternative sentencing pursuant to a delayed appeal granted by the trial court. Following our review, we affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.**

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and ALAN E. GLENN, J, joined.

Charles E. Walker (on appeal) and Randall Pierce (at evidentiary hearing), Nashville, Tennessee, attorneys for appellant, Anthony Dwight Washington.

Robert E. Cooper, Jr., Attorney General & Reporter; Rachel West Harmon, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Bret Thomas Gunn, Assistant District Attorney General, attorneys for appellee, State of Tennessee.

**OPINION**

The record reflects that the petitioner was indicted in case number 2003-B-1297 for one count of possession with the intent to sell or deliver 26 grams or more of cocaine and one count of sale of .5 grams or more of cocaine. He was also indicted in case number 2003-C-2058 for one count of rape and eight counts of statutory rape. In case number 2003-A-496, the petitioner was indicted for four counts of rape of a child. Pursuant to a plea agreement, the petitioner pled guilty on May 23, 2005, to one count of possession with the intent to sell or deliver .5 grams or more of cocaine and one count of statutory rape. All remaining counts were dismissed. As agreed to by the parties, the petitioner received concurrent sentences of one year for the statutory rape offense (which the judgment reflects as time-served) and eight years for the cocaine offense. The manner of service was

reserved to the trial court's determination. The trial court denied alternative sentencing. The petitioner did not seek a direct appeal of the denial of alternative sentencing.

On November 14, 2005, the petitioner filed a pro se petition for post-conviction relief alleging ineffective assistance of counsel, failure of the state to disclose exculpatory evidence, racial bias in the prosecution of the cases, and an involuntary guilty plea. Following the appointment of counsel and a full evidentiary hearing, the trial court denied relief on all grounds except the trial court did grant a delayed appeal regarding the denial of alternative sentencing after finding that the petitioner had been denied his right to appeal due to trial counsel's failure to pursue an appeal. The petitioner now appeals the denial of post-conviction relief and the denial of alternative sentencing.

Trial counsel testified that he was appointed to the petitioner's cases on April 26, 2004, the first day of the initial trial setting, after the trial court granted a motion to withdraw made by initial counsel. He recalled discussing the elements of the plea bargain with the petitioner prior to the entry of the guilty plea on May 23, 2005. He stated that he did not "have any independent memory of discussing" the sexual offender registry with the petitioner but that "[i]t would be [his] general practice and habit to do so in a case like [the petitioner's]." He also acknowledged that the petition to enter a guilty plea did not contain any language referring to the sexual offender registry. He denied any knowledge of any threats made by the state if the petitioner declined the plea offer and stated that "I cannot imagine that happening." Trial counsel stated that he advised the petitioner to accept the plea offer in light of the "extremely high" level of "potential exposure" if he had gone to trial and been convicted.

The petitioner testified that he had given trial counsel information regarding a license plate number of a possible confidential informant. He stated that, although trial counsel assured him that he had hired a private investigator to track down the license plate, he learned after his guilty plea that trial counsel had failed to hire any investigator. He also related how the assistant district attorney threatened him with the prosecution of the additional rape cases if he decided against entering the guilty pleas. The petitioner recalled the trial court telling him that he could not be around any children unless they were "certified or legit" as a consequence of his guilty plea to the statutory rape case. According to the petitioner, he expressed his concerns to trial counsel regarding these prohibitions on the day of the guilty plea hearing, but trial counsel failed to address them.

On cross-examination, the petitioner related that, except for the registry requirements, he was satisfied with the elements of the guilty plea agreement, admitting that he was basically only upset about the registry requirements. He also admitted that he had not presented any testimony from the alleged witness at the evidentiary hearing to support his claim that trial counsel was ineffective in failing to investigate the license plate number information as a means to discover the identity of the confidential informant. Also during cross-examination, the petitioner attempted to deny many assertions about counsel's performance that the petitioner had made during the guilty plea and sentencing hearings to the point of stating that the transcripts had been altered.

Based upon this evidence, the trial court denied the petitioner relief on his allegations of ineffective assistance and an involuntary plea. However, the trial court did grant the petitioner a delayed appeal based upon its finding that the trial court failed to relieve trial counsel and appoint appellate counsel for the purpose of perfecting an appeal of the denial of alternative sentencing. The trial court also ruled that the post-conviction issues and delayed appeal issue did not require bifurcation. On appeal the petitioner argues that the trial court erred in denying him post-conviction relief and that the trial court erred in denying him alternative sentencing. The state argues that the trial court correctly denied post-conviction relief and alternative sentencing.

## ANALYSIS

### *Ineffective Assistance of Counsel and Involuntary Plea*

The burden in a post-conviction proceeding is on the petitioner to prove his grounds for relief by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457.

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-372, 113 S. Ct. 838, 842-44 (1993). In other words, a showing that counsel's performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. 2068. The Strickland standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

In the context of a guilty plea as in this case, the effective assistance of counsel is relevant only to the extent that it affects the voluntariness of the plea. Therefore, to satisfy the second prong of Strickland, the petitioner must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985); see also Walton v. State, 966 S.W.2d 54, 55 (Tenn. Crim. App. 1997).

The petitioner contends that trial counsel was ineffective for failing to investigate the identity and possible testimony of a confidential informant prior to the entry of the guilty pleas. He also contends that trial counsel misled him into believing that an investigator had been hired for that purpose when, in fact, an investigator was never hired. The record reflects a tumultuous history of representation by various attorneys culminating with trial counsel's appointment to the cases on the

eve of the initial trial setting. Trial counsel testified that he had complete access to the investigatory files and pleadings filed by prior counsel and opined that the cases were basically ready to be tried at the time of his appointment. He further related that the procurement of an investigator related only to the drug case, which was set later than the statutory rape cases. He recalled that once the pleas were entered in all the cases on the day the statutory rape cases were set for trial, it was obviously unnecessary to do further any investigation. We also note that, despite the fact that the petitioner admits in his brief that he was aware of the identity of the alleged confidential informant, the petitioner failed to present any testimony from the witness at the evidentiary hearing. In this regard, the petitioner's failure to present the testimony of this additional witness precludes a finding of prejudice as required by Strickland. See State v. Black, 794 S.W.2d 752, 758 (Tenn. Crim. App. 1990). Under these circumstances, we agree with the trial court that the petitioner has failed to show that trial counsel was ineffective regarding the hiring or use of an investigator.

The petitioner also contends that trial counsel committed ineffective assistance of counsel by allowing the district attorney to pressure him into pleading guilty. The transcript of the guilty plea hearing and the testimony at the evidentiary hearing refutes this claim. Trial counsel testified that no one pressured the petitioner into pleading guilty, but that both trial counsel and the district attorney accurately informed the petitioner of the potential sentences he would face if convicted at trial. The guilty plea submission transcript further reflects that the petitioner was not coerced into entering his guilty pleas. Therefore, we conclude that the evidence does not preponderate against the trial court's findings relative to this allegation.

Finally, the petitioner contends that trial counsel was ineffective for failing to advise him regarding the requirements of the sex offender registry and that this failure to advise rendered his guilty plea involuntary because had he known of the registry requirements, he would not have pled guilty to statutory rape. Regarding the separate allegation of an involuntary guilty plea, this court had held that allegations that a petitioner "was unaware of the tertiary consequences of his guilty plea [is] not a cognizable claim for post-conviction relief." Casey Skelton v. State, No. E2007-02818-CCA-R3-CD, 2008 WL 3983114, at \*3 (Tenn. Crim. App. Aug. 28, 2008). Therefore, the petitioner is not entitled to relief on the basis of his involuntary guilty plea allegation.

In consideration of the petitioner's claim of ineffective assistance of counsel, this court has held that "counsel does not deficiently perform by remaining silent on the matter of 'collateral consequences' implicated by [a petitioner's] pleading guilty to [a sexual offense]." *Id.* at \*5.<sup>1</sup> Although trial counsel testified at the evidentiary hearing that it was his "general practice and habit" to advise a client of the requirements of the sexual offender registry, he could not specifically recall advising the petitioner in this case. Furthermore, both the petition to enter a guilty plea and the guilty plea hearing transcript contain no reference to the registry requirements. Under these

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<sup>1</sup> However, as also noted by this court in Skelton, ineffective assistance of counsel may arise if counsel imparts erroneous advice regarding collateral consequences. *Id.* at \* 5-6. Such a situation is not presented by the proof in this case.

circumstances, we conclude that the trial court correctly denied relief based upon this allegation.

*Delayed Appeal - Denial of Alternative Sentencing*

In consideration of the petition for post-conviction relief allegations, the post-conviction court found that the petitioner should be granted a delayed appeal because trial counsel did not continue representing the petitioner after the guilty pleas and, thereby, failed to pursue an appeal of the trial court's denial of alternative sentencing. Thus, on appeal the petitioner contends that the trial court should have granted him an alternative sentence based upon his testimony at the sentencing hearing that he was a changed man. The state contends that the trial court correctly denied any form of alternative sentence based upon the petitioner's prior criminal history and failed efforts at rehabilitation. Following our review, we agree with the state.

When a defendant challenges the manner of service of a sentence, this court generally conducts a de novo review of the record with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (2003). This presumption, however, is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. State v. Ashby, 823 S.W.2d 166, 169 (Tenn.1991). The burden of showing that the sentence is improper is upon the defendant. Id. If the review reflects the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). In the event the record fails to demonstrate the required consideration by the trial court, appellate review of the sentence is purely de novo. Ashby, 823 S.W.2d at 169.

In determining whether the petitioner should have received an alternative sentence, the trial court, at the conclusion of the guilty plea submission hearing, was obliged to consider (1) the evidence, if any, received at the guilty plea and sentencing hearings, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct involved, (5) evidence and information offered by the parties on the enhancement and mitigating factors, (6) any statements the defendant made in his behalf about sentencing, and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-210(a), (b); -103(5)(2003); State v. Holland, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993).

Under the 2003 version of the Sentencing Act, an "especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6) (2003). Furthermore, a defendant is eligible for probation "if the sentence actually imposed upon such defendant is eight (8) years or less," and the trial court is required to consider probation as a sentencing option. Tenn. Code Ann. § 40-35-303(a), (b)(2003). A defendant's potential for

rehabilitation or lack thereof should be examined when determining if an alternative sentence is appropriate. Tenn. Code Ann. § 40-35-103(5). A defendant seeking full probation bears the burden of showing that probation will “subserve the ends of justice and the best interest of both the public and the defendant.” State v. Dykes, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990) (quoting Hooper v. State, 297 S.W.2d 78, 81 (Tenn. 1956)), overruled on other grounds by State v. Hooper, 29 S.W.3d 1, 9-10 (Tenn. 2000). Among the factors applicable to probation consideration are the circumstances of the offense; the defendant’s criminal record, social history, and present condition; the deterrent effect upon the defendant; and the best interests of the defendant and the public. State v. Grear, 568 S.W.2d 285, 286 (Tenn. 1978).

In this case, the petitioner received a sentence of eight years in exchange for his plea of guilty to the sale of .5 grams or more of cocaine, which is a Class B felony. Because the sentence actually imposed was an eight-year sentence, the petitioner was eligible for probation for this offense. See Tenn. Code Ann. § 40-35-303(a) (2003). However, because the conviction offense is a Class B felony, the petitioner enjoyed no presumption of favorable candidacy for alternative sentencing. See Tenn. Code Ann. § 40-35-102(6). With regard to the statutory rape offense, the judgment reflects that the one-year sentence for this offense had already been served as a result of the petitioner’s pre-guilty plea incarceration and, for this reason, the petitioner makes no issue of the denial of alternative sentencing as it relates to the statutory rape conviction. Regarding the denial of alternative sentencing, the trial court noted the petitioner’s history of criminal convictions, as admitted by the petitioner, consisting of eight felonies and fifteen misdemeanors. The petitioner also admitted to past failures at probation. Under these circumstances, we conclude that the trial court correctly denied alternative sentencing.

## CONCLUSION

The evidence does not preponderate against the trial court’s denial of post-conviction relief. Furthermore, regarding the delayed appeal of alternative sentencing, we conclude that the trial court correctly denied alternative sentencing. Therefore, the judgment of the trial court is affirmed in all respects.

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D. KELLY THOMAS, JR., JUDGE